

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

LISA M. SPEHN, )  
Plaintiff, ) No. 6:11-cv-3033-HO  
v. ) ORDER  
Commissioner of Social Security, )  
Defendant. )

On April 15, 2012, this court reversed the decision of the commissioner and remanded for further proceedings. The decision to remand hinged on Dr. Mark Kimsey's completion of a psychiatric review technique form after the ALJ issued his decision. Because the form indicated that plaintiff meets the Listings for affective disorders and anxiety related disorders, a remand was necessary. However, the court noted that there may be good reason to reject Dr. Kimsey's report, and the agency should have a chance to

evaluate the report.

Plaintiff now seeks an award of attorney fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, in the amount of \$4,000. The Commissioner objects asserting his position was substantially justified.

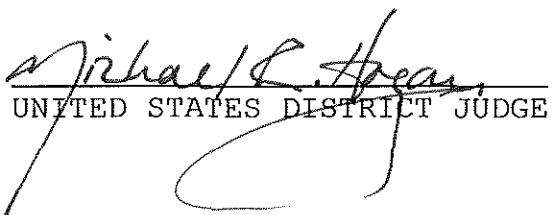
Under the EAJA, a prevailing party is entitled to fees and expenses unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A). "Substantially justified," for purposes of the EAJA, "is not 'justified to a high degree,' but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). In other words, the government's position must have both a reasonable basis in law and in fact. Id.

The government was not unreasonable in arguing that Dr. Kimsey's report was not new and material evidence that undermined the evidentiary basis of the ALJ's decision. Of course, the nature of administrative review makes it difficult for a reviewing court to make such a determination, but reasonable minds certainly could disagree as to the materiality of the report. Therefore, the court finds that the Commissioner's position at every stage of the proceedings to this point was substantially justified. Accordingly, plaintiff's application for fees is denied.

CONCLUSION

For the reasons stated above, plaintiff's motion for attorney's fees and costs (#24) is denied.

DATED this 18<sup>th</sup> day of June, 2012.

  
MICHAEL C. AEBY  
UNITED STATES DISTRICT JUDGE